

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7501 of 1995

For Approval and Signature:

Hon'ble MR.JUSTICE N.N.MATHUR

1. Whether Reporters of Local Papers may be allowed
to see the judgements?

YES

2. To be referred to the Reporter or not?

YES

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

@@

3. Whether Their Lordships wish to see the fair copy
of the judgement?

NO

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?

NO

5. Whether it is to be circulated to the Civil Judge?

NO

MITESH MANUBHAI SHETH

Versus

SECRETARY

Appearance:

MR MR ANAND, SR ADVOCATE WITH MR KS JHAVERI for Petitioner
MR KN RAVAL, SR ADVOCATE WITH MR CHHATRAPATI for
Respondent SEBI

CORAM : MR.JUSTICE N.N.MATHUR

Date of decision:27/02/1997

JUDGEMENT

1. The petitioner is a Member of Ahmedabad Stock Exchange and is carrying on his business as Stock Broker in Ahmedabad and is registered with the Securities and Exchange Board of India (hereinafter referred to as "SEBI") authorising the petitioner to carry on business in the name of M/s Mitesh Manubhai Sheth. The petitioner was served with a notice of inspection by SEBI on February 07, 1994. The inspection was undertaken from 14/02/94 to 16/02/94. The substance of the deficiencies observed during the inspection were communicated to the petitioner under memo dated May 30, 1994. The petitioner responded the same by letter dated September 14, 1994. On September 29, 1994, SEBI issued a notice to the petitioner under the Regulations 28(2) for enquiry to be undertaken by one Shri R.V.Nabar, Enquiry Officer. The letter was also accompanied by a memorandum containing the adverse finding of the inspection team. The petitioner was called upon to reply within 30 days of the receipt of the notice and to produce documentary evidence in support of his reply. The petitioner was also informed that if he so desires, he could appear in person or through any other person duly authorised by him before the Enquiry Officer. The petitioner vide letter dated November 30, 1994 replied the notice and refuted the charges levelled against him. He relied on his earlier reply dated September 14, 1994, in response to the finding of inspection, as the charges in the notice under Regulations 28(2) were based on the finding of the inspection. The Enquiry Officer also granted the petitioner an opportunity of personal hearing. The petitioner took the service of one Shri Shreyas Parikh, Chartered Accountant to appear before the Enquiry Officer. The Enquiry Officer submitted the report to SEBI under memo dated January 20, 1995. The recommendation was made for the suspension of the petitioner from its stockbroking business for a period of twelve months. This report of the Inquiry Officer was communicated by SEBI to the petitioner on February 08, 1995 alongwith the show cause notice issued under sub-regulation (1) of Regulation 29. The petitioner was called upon to show cause within 21 days as to why his registration should not be suspended for a period of 12 months. The petitioner submitted a detailed reply and also sought personal hearing which was granted.

Mr C.B.Bhave, Senior Executive Director, SEBI, agreed with the finding of the Enquiry Officer and by order dated April 24, 1995, suspended the registration of the petitioner for a period of six months w.e.f. May 15, 1995.

2. Being Aggrieved by the said order, the petitioner preferred an appeal to the Central Government. The appeal was heard by the Special Secretary (Insurance), Department of Economics Affairs, Ministry of Finance, Government of India.

3. The appellate authority noticed that the proceedings under Regulation 28 and 29 commenced with an enumeration of 15 contraventions of law, Rules and Regulations being imputed against the petitioner. However, SEBI held only eight of these Charges against the petitioner. The substance of the eight charges is given as follows :

- (a) The member (Shri Mitesh M.Seth) violated regulation 17 of the SEBI (Brokers and Sub Brokers) Regulations 1992 and Rule 15(1) of Securities Contract (Regulations) Rules, 1957 by not maintaining the Stock ledger.
- (b) The member did not issue contract notes to his clients which has resulted in the violation of Code of Conduct B(2) prescribed for Stock Brokers under Schedule II to Regulation 7 of SEBI (Brokers and Sub Brokers) Regulations. The member is also liable for penalty under bye-law 355 (b) of the Ahmedabad Stock Exchange bye-laws.
- (c) The member has violated Regulation 17(1)(i) of SEBI (Brokers and Sub Brokers) Regulations, 1992 Section 15 of SC (Regulation) Act, 1956, Rule 15 (2) (c) of SC (Regulation) Rules 1957 and Bye-laws 199 and 221 (b) of ASE Bye-laws by not obtaining written consent from his client for the transactions done by him on a principal to principal basis.
- (d) SEBI had suspended the member from 22/07/93 to 05/08/93 for non-payment of fees. The member purchased as well as sold 28,000 shares of Reliance Industries on 3/8/93 while the member was still under suspension. This has resulted in the violation of Regulation 30(1) of SEBI (Stock Brokers and Sub Brokers) Regulations, 1992. The member is also liable for penalty under

Regulation 26(1) of the said regulations.

- (e) The member has dealt with a sub broker Shri Nitin Modi who is neither registered with SEBI nor has applied for registration. He has, therefore, violated Rule 3 of SEBI (Stock brokers and Sub Brokers) Rules, 1992.
- (f) In continuation to his violation at (1) above the member also allowed Shri Nitin Modi to enjoy unrestricted privileges of the membership of the Ahmedabad Stock Exchange. This has resulted in violation of Rule 6 of ASE Rules.
- (g) The member is guilty of unbusiness like conduct by purchasing shares on behalf of this client M/s Modi Consultants at rates which were different from the prevailing market rates. The member purchased 100 shares of Vesnvious @ Rs. 61/- on 11/01/1994 and sold the same on the next day Rs. 86/- on behalf of M/s Modi Consultants against the prevailing market rate of Rs. 61/Rs. 61.50. Further, on 12/01/94, he purchased 4600 shares of Himachal Telecommunications @ Rs. 83/against the market rate of Rs. 110/- on behalf of the same firm. This has resulted in the violation of Bye-law 357 (ii) of ASE Bye-laws. The member is also liable for penalty under Bye-law 355 (b) of ASE Bye-laws.
- (h) The member has violated Regulation 21(4) of SEBI (Stock Brokers and Sub Brokers) Regulations 1992 by adopting an indifferent attitude with the inspection team and not cooperating with them properly.

4. The first three charges relate to the procedural irregularities.

So far as the Charge "A" is concerned, it was found that, during the personal hearing on March 27, 1995, the petitioner admitted his failure to maintain the stock registers as required under the Rules. The admission is contained in the statement recorded on March 27, 1995 which bears signature of Mitesh Sheth.

Similarly, the petitioner also admitted in written reply dated March 24, 1995 as to the maintaining of accounts of other brokers as well as in the clients ledger as a part of inadvertent mistake.

Regarding the Charge "C" i.e. failure to issue contract note to the client, the appellate authority found that the said contravention too stands admitted by the petitioner. Regarding failure to obtain written consent from the clients while acting on principal to principal basis, the contention of the petitioner that this was not essential and verbal consents were adequate. It was admitted before the Sr. Executive Director by the petitioner Mitesh Sheth that as per the record maintained and authenticated, there had not been written consent. Thus, on appreciation of facts, the appellate authority upheld the findings of the Sr. Executive Director.

With regard to the Charge "D", it was contended that the entry in the books for August 03, 1993 represent a squaring up of earlier transaction. However, during the hearing on March 27, 1995, the petitioner admitted to have entered into Havala transaction with a member who was not under suspension. It was conceded that so far as the transaction of August 03, 1993 was concerned (which related to the purchase and sale of 28000 shares of Reliance Industries) were transacted in violation of the order of suspension. The appellate authority also agreed with the observation of the Executive Director that, if the transactions were merely a squaring off entries, then Shri Mitesh Sheth would not have been required to both purchase and sell the said shares.

With respect to the Charges "E" and "F", it was found that Shri Nitin Modi operated extensively on behalf of the petitioner and engaged himself also in the transaction on behalf of the father Modi Consultants, without paying any significant amount by way of brokerage. In a statement recorded at the time of inspection on February 14, 1994, the petitioner admitted his mistake in allowing Shri Modi to operate freely on his behalf and without charging brokerage. During the hearing of 27th March, 1995, he explained that Ahmedabad Stock Exchange had not clearly explained the procedure for registration of sub-brokers to its members and hence Shri Mitesh M Sheth had dealt with Shri Modi as a client. On proper appreciation of facts, the appellate authority upheld the finding of the SEBI on these two charges, as well.

Regarding the Charge "G", it was found that the purchase of the shares of Himachal Communication at lower than market rate was not reported to the Exchange. The explanation given by the petitioner was not found to be satisfactory. The finding in this regard was also upheld. The petitioner however was exonerated of the

charge at item "H".

6. The appellate authority rejected the contention raised with respect to procedure adopted by the Enquiry Officer and the Sr. Executive Director, SEBI, saying that the proceedings before the SEBI authorities are essentially of administrative nature. The Supreme Court judgement which was cited before the authority, was not considered on erroneous ground. Without going further, suffice it to say that when administrative authorities exercise judicial or quasi-judicial powers, it is expected that they adopt a judicious approach. Be that as it may, the appellate authority while agreeing with the SEBI that the violations are numerous and serious, keeping in view the lighter penalties imposed on number of fellow members for lapse, a lenient view was taken and penalty of suspension was reduced from a period of six months to three months. The appeal was accordingly rejected with modification on the point of quantum of penalty, by order dated August 29, 1995.

7. Mr M.R.Anand, learned Sr. Advocate appearing for the petitioner urged that Enquiry officer has not conducted the inquiry required under the law and the same is violative of the principles of natural justice. He also submits that the petitioner was considerably handicapped before Enquiry officer without the assistance of a lawyer. He has also challenged the findings of the inquiry officer, as confirmed by the appellate authority on each count.

8. On the other hand, Mr. K.N.Raval, learned Sr. Advocate submits that the impugned order of suspension has been passed after fully complying with the provisions of the Regulations. With respect to the finding on each count, it is submitted that there is a concurrent finding of fact and the petitioner has failed to point out any error apparent on the face of record warranting the interference of this Court in exercise of powers under Article 227 of the Constitution. With respect to the question of allowing the lawyer to appear, learned counsel submits that the proviso to Regulation 28 (5) prohibits the appearance of a lawyer to represent stock broker at the inquiry. Facing with this difficulty, the petitioner by way of amendment has challenged the validity of Regulation 28(5) of the Security and Exchange Board of India (Stock Brokers and Sub Brokers) Regulations, 1992 (hereinafter referred to as 'the SEBI Regulations, 1992').

9. In order to appreciate the contentions raised, it

would be convenient to acquaint with the Scheme of the SEBI Act and SEBI Regulations, 1992. The preamble to the SEBI Act says that this is an Act to provide for establishment of a Board for two purposes viz. (1) to protect the interest of investors in securities; and (2) to provide development of, and to regulate, the securities market. These two subjects of SEBI are reiterated as functions of SEBI in section 11 of the Act. Section 11 of the SEBI Act empowers the SEBI to provide for such measure that it may think fit with a view to protecting the interest of securities and to permit the development of, and to regulate the securities market. Chapter IV deals with powers and functions of the Board. Section-11 enumerates the functions of the Board. Clause (a) of subsection-2 provides for regulating the business in stock exchanges and other securities market. Section 12 provides for registration of stock brokers, share transfer agents and other intermediaries associates with securities market. Sub-section (3) empowers SEBI to suspend or cancel a certificate of registration granted by it under sub-section (1). However, this is permissible only in accordance with the Regulations made by SEBI in this behalf. The proviso to the sub-section enacts the principles of natural justice and requires that before making an order for cancellation or suspension of a certificate of registration, a reasonable opportunity of being heard must be given to the person against whom the order is sought to be made. obviously because any order passed by SEBI under this sub-section may affect vital civil rights of the concerned person. Section 20 gives right of appeal to the person who is aggrieved by an order of SEBI under the Act or the Rules or the Regulations made thereunder. The appeal lies to the Central Government. To carry out the purposes of the SEBI Act, section 30 empowers SEBI to make Regulations and also lay down the procedure to be followed by SEBI in discharging its functions under the Act. Thus, in exercise of powers conferred by section 30 of the SEBI Act, 1992, the Board with the approval of the Central Government, frame the Regulations, called as Securities and Exchange Board of India (Stock Brokers & Sub-Brokers) Regulations, 1992, referred to as the SEBI Regulations, 1992. Sub-clause (a) of Regulation - 2 defines 'Enquiry officer' means any officer of the Board or any other person having experience in dealing with the problems relating to the securities market who is appointed by the Board under Chapter VI. Sub-clause (c) of Regulations (2) defines 'inspecting authority' means one or more persons appointed by the Board to exercise the powers conferred by Chapter V of the Regulations. Chapter II provides for the registration of sub-brokers Chapter VI

enumerates the general obligations and responsibilities of a stock broker. Chapter VIII provides procedure for inspection. Chapter VI provides procedure for action in case of default. Regulation 26 provides a penalty of suspension, cancellation of registration. Regulation 27 provides that no order of penalty of suspension or cancellation shall be imposed, except after holding an Enquiry in accordance with the procedure specified in Regulation 28. Regulation 28 provides the manner of holding enquiry. The inquiry is to be initiated by appointing an Enquiry officer by the Board. Thereafter, the Enquiry officer is required to issue a notice to the stock broker. The stock broker may within 30 days from the date of receipt of such notice, furnish to Enquiry officer a reply together with the copies of the documentary or other evidence relied on by him or sought by the Board from him. Sub-clause (4) enjoins the duty of the Enquiry officer to give a reasonable opportunity of hearing to the stock broker to enable him to make submission in support of his reply. Sub-clause (5) provides that, before the Enquiry officer, the stock broker may either appear in person or through any person duly authorised by him. However, the proviso appended to the sub-clause prohibits the appearance of a lawyer or advocate to represent the stock broker at the Enquiry. The second proviso permits the appearance of lawyer or advocate only in a case where the lawyer or advocate has been appointed by the Board as 'presenting officer'. Sub-clause (7) provides that the Enquiry officer shall after taking into account all relevant facts and the submissions made by the stock broker, submit a report to the Board and recommend the penalty to be awarded in the notice. Regulation 29 provides that, on receipt of the report from the Enquiry officer, the Board shall consider the same and issue a showcause notice as to why the penalty as it considered appropriate should not be imposed. Regulations 2, 3, 4 and 5 provide the procedure for consideration by the Board. Regulation 30 provides the effect of suspension and cancellation of registration of a stock broker. For the convenience and ready reference, Regulation 28 and 29 are reproduced as follows:-

"28. Manner of holding enquiry :

- (1) For the purpose of holding an enquiry
under regulation 27, the Board may
appoint an enquiry officer.
- (2) The enquiry officer shall issue to the

stockbroker a notice at the registered office or the principal place of business of the stockbroker.

(3) The stockbroker may, within thirty days from the date of receipt of such notice, furnish to the enquiry officer a reply together with copies of documentary or other evidence relied on by him or sought by the Board from him.

(4) The enquiry officer shall give a reasonable opportunity of hearing to the stockbroker to enable him to make submissions in support of his reply made under sub-regulation (3).

(5) Before the enquiry officer, the stockbroker may either appear in person or through any person duly authorised on his behalf.

Provided that no lawyer or advocate shall be permitted to represent the stockbroker at the enquiry :

Provided further that where a lawyer or an advocate has been appointed by the Board as a presenting officer under sub-regulation (6), it shall be lawful for the stockbroker to present its case through a lawyer or advocate.

(6) If it is considered necessary, the enquiry officer may request the Board to appoint a presenting officer to present its case.

(7) The enquiry officer shall, after taking into account all relevant account all relevant facts and submissions made by the stock broker, submit a report to the Board and recommend the penalty to be awarded as also on the justification of the penalty proposed in the notice.

29. Show-cause notice and order :-

(1) On receipt of the report from the enquiry officer, the Board shall consider the same and issue a show cause notice as to

why the penalty as it considers appropriate should not be imposed.

(2) The stock broker shall within twenty one days of the date of the receipt of the showcause sent a reply to the Board.

(3) The Board after considering the reply to the showcause notice, if received, shall as soon as possible but not later than thirty days from the receipt of the reply, if any, pass such order as it deems fit.

(4) Every order passed under sub-regulation (3) shall be self-contained and give reasons for the conclusions stated therein including justification of the penalty imposed by the order.

(5) The Board shall send a copy of the order under sub-regulation (3) to the stock broker, stock exchange of which the stockbroker is the member and to the Central Government.

10. It would be appropriate to first deal with the question of validity of proviso to Regulation 28 (5) of the SEBI Regulations. It is contended that the first proviso to Regulation 28(5) is violative of Article 19(1)(a) and 21 of the Constitution. It is urged that the litigant has got a fundamental right to be represented by a counsel in any Court of law or Tribunal and his fundamental right under Article 21 is a part of the litigant's life. It is contended that the provision is arbitrary inasmuch as it does not give any discretion even to the Board or the inquiry officer to permit the appearance of a lawyer in a case in which complicated questions of fact and law are involved.

11. On the other hand, it is contended by Mr.K.N.RAVAL, that no litigant has fundamental right to be represented by a lawyer or advocate in any Court of law or the Tribunal. The only fundamental right recognised by the Constitution is under Article 22(1), by which an accused who is arrested and detained in custody, is entitled to consult and be defended by the legal representative of his choice. Even there also, Article 22(3)(b) makes an exception in case of any person arrested or detained under any law providing for

preventive detention. He further submits that whether lawyer should be allowed to appear or not is a matter of policy, with which the Court cannot primarily be concerned. On the facts of the case, it is submitted that the assistance of the Chartered Accountant was availed by the petitioner which was sufficient, as the Enquiry involves issues involving commercial matters. He further submits that the inquiry has proceeded on the basis of admission of the petitioner. The petitioner at no stage asked for being represented by a lawyer or advocate. In view of this, he cannot be permitted to first time raise the controversy in this Special Civil Application. It is also submitted that the embargo under first proviso to Regulation 28(5) with respect to the appearance of a lawyer or advocate is not absolute, as the second proviso permits appearance of a lawyer or advocate in a case where the presenting officer is also a lawyer or advocate.

11. To get a key to the issue involved, I may take guidance from the celebrated decisions of the Apex Court.

12. In *Kalindi vs. Tata Locomotive and Engineering Company* reported in AIR 1960 SC 914, a question arose whether in an enquiry by management into misconduct of a workmen, the workmen was entitled to be represented by a representative of the union. Answering this question, the apex Court observed that a workman against whom an enquiry is being held by the management has no right to be represented, at such an enquiry by a representative of the union though the employer in his discretion can and may allow him to be so represented. In such enquiries, fairly simple question of fact as to whether certain acts of misconducts were committed by a workman or not, to be considered and the workman is best suited to conduct the case. Ordinarily, in enquiry before the domestic Tribunal, a person accused of any misconduct, conducts his own case and so, it cannot be said that, in enquiry against the workman, natural justice demands that he should be represented by a representative of his union. The same view has been taken by the apex Court in case of *Brooke Bond (India) Ltd v. Sulika Raman* reported in 1961 (2) Labour Law Journal 417 and *Development Rubber Company v. Workman*, AIR 1965 SC 1392. In the case of *C.L.Subramaniam v. Collector Customs*, reported in AIR 1972 SC 2178, the appellant who was a member of the civil services of the Union of India, was holding his office during the pleasure of the President, but in view of the Article 311 of the Constitution of India, he could not have been removed from service, except after inquiry in which he had been given a reasonable opportunity of being

heard in respect of the charges levelled against him. A trained police prosecutor was appointed as the officer to present the case before the Enquiry officer. After his appointment, the employee submitted an application stating that, as the departmental representative is legally trained person to conduct such prosecution, he will be prejudiced in his defence unless he is permitted to engage a counsel to appear and defend him during the enquiry. This request was turned down. The enquiry officer recommended the appellant's removal from service. On the basis of that recommendations, disciplinary authority served on the appellant a notice to show cause as to why he should not be removed from the service. The appellant submitted the explanation, but the same was not accepted and as a result, he was ordered to be removed from service. The appellant unsuccessfully challenged the order of his removal from service. The question arose before the apex Court whether the appellant was given reasonable opportunity to defend himself in accordance with the sub-rule (5) of rule 15 of the Central Civil Services (Qualifications Control and Appeal) Rule, 1957. The relevant Rule reads as follows:

"The Disciplinary Authority may nominate any person to present the case in support of the charges before the authority inquiring into the charges (hereinafter referred to as the Inquiring Authority). The Government servant may present his case with the assistance of any Government servant approved by the Disciplinary Authority, but may not engage a legal practitioner for the purpose unless the person nominated by the Disciplinary Authority as aforesaid is a legal practitioner or unless the Disciplinary Authority, having regard to the circumstances of the case, so permits."

13. The employee voiced the grievance that he was pitted against the trained prosecutor and inspite of that the disciplinary authority did not consider his request for being defended by a legal practitioner. On behalf of the department, it was submitted that it is a matter within the discretion of the Enquiry officer whether to grant the permission and more so, because the relevant rules fatal to the claim to appear through the legal practitioner. Negating this contention, the apex Court held that the fact that case against the appellant was being handled by a trained prosecutor, while by itself is a good ground for allowing the appellant to engage a legal practitioner to defend him least the scale should be weighed against him. This conclusion was recorded

after reference to the earlier decision in case of Brook Bond (India) Ltd and Dunlop Rubber Co. (supra). Both the cases were distinguished by the apex Court on the ground that in those cases, the question for consideration was whether the person proceeded against in an inquiry before the domestic Tribunal had the right to be represented by someone else on the basis of principles of natural justice. Therein, the Court was not called upon to consider the limits of the reasonable opportunity to defend oneself guaranteed under Article 311 or the scope of statutory rule.

14. The apex Court in Board of Trustees, Port of Bombay vs. Dilipkumar 1983 SC 109 took a forward march to fair play in action that, in an inquiry before the domestic Tribunal, the delinquent officer is pitted against the legally trained man, if he seeks permission to appear through legal practitioner, refusing to grant his request would amount to denial of reasonable request to defend himself and the principle of natural justice would be violated. In the said case, a charge sheet was drawn up as against employee for the alleged misconduct. Before the Enquiry officer, employee submitted a request seeking permission to engage legal practitioner for his defence which was turned down. The employer relied upon Regulation 12(8) of the Bombay Port Trust Employees Regulations, 1976, which reads as under :

"12(8) :: The employee may take the assistance of any other employee or, if the employee is a Class III or a Class IV employee, of an "Office Bearer" as defined in clause (d) of section 2 of the Trade Unions Act, 1926 (16 of 1926) of the union to which he belongs, to present the case on his behalf, but may not engage a legal practitioner for the purpose unless the said Presenting Officer appointed by the disciplinary authority is a legal practitioner, or, the disciplinary authority, having regard to the circumstances of the case, so permits."

15. A reading of section 12(8) shows that, ordinarily the employee is not permitted to be represented by a lawyer unless the Presiding Officer appointed by the authority is a legal practitioner or the disciplinary authority, having regard to the facts and circumstances of the case, so permits. Therefore, there is a discretion vested with the disciplinary authority to permit an employer to be represented by a lawyer, if the

circumstances of the case so permits. Considering the facts of the case and particularly, the serious consequences likely to ensue in an event of adverse verdict and with a view to give a reasonable opportunity to defend, the Court held that the respondent employee ought to have been allowed to appear through the legal practitioner. The apex Court referring to the expression "life" word employed in Article 21 of the Constitution, held thus,

"And this view was taken as flowing from Article 21 which mandates that no one shall be deprived of his life or liberty except in accordance with the procedure prescribed by law. The expression 'life' does not merely connote animal existence or a continued drudgery through life. The expression 'life' has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, some of the finer graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedures."

15. In J.K. Aggarwal v. Haryana Seeds Development Corporation Ltd reported in AIR 1991 SC 1221, the appellant was a Company Secretary of the Haryana Seeds Development Corporation Ltd, a Government Company. During the course of disciplinary inquiry initiated against him, the Corporation on certain charges, if established, might lead to his dismissal from services and thus, a prayer was made before the disciplinary authority to grant him permission to engage the services of a lawyer. This was declined. The employee unsuccessfully challenged the proceedings on the ground of denial of natural justice before the High Court. The apex Court referred to the observations of Lord Denning, in a leading case Pett v. Grayhound Racing Association Ltd. (1968) 2 ALL ER 545 thus;

"I should have thought, therefore, that when a Man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He has also a right to speak by counsel or solicitors

The Court examined the grievance of the employee, after referring its earlier decision, particularly in case of

C.L.Subramaniam and also the Board of Trustees, with reference to the provisions of Rule 7(5) of the Civil Services (Punishment and Appeal) Rules, 1952. The relevant part of the said Rules is extracted as follows:-

" 7(5) - Where the punishing authority itself enquires into any charge or charges or appoints an enquiry officer for holding enquiry against a person in the services of the Government, it may, by an order, appoint a Government servant or a legal practitioner to be known as a 'presenting officer' to present on its behalf the case, in support of the charge or charges.

The person against whom a charge is being enquired into, shall be allowed to obtain the assistance of a Government servant, if he so desires, in order to produce his defence before the enquiring officer. If the charge or charges are likely to result in the dismissal of the person from the service of the Government. Such person may, with the sanction of the enquiry officer, be represented by counsel."

Considering the case, it was found that the refusal to sanction the services of the lawyer in the enquiry was not proper exercise of discretion under the Rules, resulting in failure of natural justice. The Court noticed that the delinquent had no legal background. On the other hand, the Corporation was represented by its Personnel & Administrative Manager, who is said to be a man of law.

Justice C.K.Thakkar of this Court in Smt. Meeta J. Mehta vs. Valsad - Dang Gramin Bank reported in 37(2) GLR 517 held that ordinarily when an employee is facing Departmental enquiry of various nature and allegations are that if they are proved, may result in serious consequences, resulting into economic death penalty or substantive major punishment, like removal or other penalty of a major nature, it is not uncommon that an employee may be puzzled and she may not be in position to defend herself properly and may not be able to cross examine effectively the witnesses. The learned Judge also while reminding the well established principle that justice should not only be done, but manifestly and undoubtedly be seen to be done, observed that if the legal assistance will be denied to the petitioner, it may be that justice may be done, but there may be apprehension in the mind of the petitioner that justice might not have been done to her. Dealing with the

decision of the Supreme Court relied on by the employer Bank, Krishna Chandra Tondon vs. Union of India, AIR 1974 SC 1589, the learned Judge found that ratio decedent laid down in the said case instead of supporting the case of respondent, supports the case of the petitioner.

16. Therefore the trend in in favour of exercising discretion permitting a person to be represented through a lawyer who is likely to suffer civil or pecuniary consequences as a result of Enquiry. In C.L. Subramaniam's case, considering the sub-rule (5) which prohibits engaging a legal practitioner, except it is so permitted by the disciplinary authority having regard to the facts and circumstances of the case, in Board of Trustees case, rule 12(8) was considered which also provides that a delinquent is not permitted to engage a legal practitioner unless the disciplinary authority having regard to the facts and circumstances of the case so permits. In J.K. Aggarwal's case, rule 7(5) which also does not permit a delinquent employee to be represented by a legal practitioner, except with the sanction of the Enquiry officer, if the circumstances so permit, the consistent view of the Courts is that the question whether the delinquent should be permitted to be represented by a legal practitioner, has to be decided on a case to case basis on the situational particulars and the special requirements of justice of the case. In the matter of exercise of discretion, one of the relevant factor is whether there is likelihood of combat being unequal entailing a miscarriage of failure of justice and denial of real and reasonable opportunity for defence by reasons of employees being pitted against the Presiding Officer, who is a trained in law. The view is that the provisions should be liberally construed.

17. The survey of the provisions of the SEBI Act clearly shows that the entire business of the stock broker is regulated by the provisions of the SEBI Act, 1992 and the Regulations made thereunder. Section 12 provides for Board to Registrar, Stock Brokers, Share Transfer agents and other intermediaries associated with the securities market. Sub-section (3) empowers SEBI to suspend or cancel a certificate of registration granted by it under sub-section (1). Thus, the order of the Board under this sub-section (3) would affect vital civil rights of the concerned person. In view of this, the principle of natural justice equally applies to these proceedings. Sub-rule (5) of rule 28 of the Regulations, 1992 permits the stock broker either to appear in person or through any person duly authorised on his behalf except by lawyer. A lawyer can be permitted only in a

case where the Board has appointed an advocate as Presenting Officer or where the inquiry officer may request the Board to appoint the Presiding Officer to present its case. This rule does not give discretion to of the authority to permit a stock broker to be represented by a lawyer, even if the facts of the case so warrant. The only eventuality provided is that when the inquiry officer considers that the case is of a nature where, in his opinion, it is necessary that an advocate is appointed as a Presenting Officer. The one way to look to the provisions can be that the of Enquiry officer considers himself so well equipped in law that he does not require assistance of any advocate and therefore, he does not consider to make such requests to the Board, in such eventuality, the stock broker will be pitted against such a well equipped person of high legal acumen.

18. I have failed to persuade myself as to why there should be any obsession to the presence of a lawyer in a case which involves complicated question of law and fact. The presence of a lawyer cannot only be useful to the delinquent but also to Tribunal or Enquiry Committee to arrive at a just and appropriate decision. It is now well settled that, in an enquiry affecting the legal rights of a person by a judicial or quasi-judicial or even administrative decision, the party affected should be permitted to be represented through lawyer, if facts of the case so warrants. While it is true that, before a particular Tribunal, a lawyer should be allowed or not is a matter of policy, but keeping in view the mandate of Article 21 of the Constitution of India, a decision reached by the Tribunal held to be vitiated on the ground that enquiry was held in violation of the principle of natural justice as the delinquent was not afforded reasonable opportunity to defend himself in the enquiry. The cancellation of registration of stock broker has definitely serious civil consequences and if the intricacy of the case so warrants, it will be denial of justice if the authority concerned is not even vested with power to consider that in the facts of the case, representation of a stock broker through lawyer is expedient. The Statutory provisions are required to be in consonance of the principle of natural justice inasmuch as the right of a person having serious civil and pecuniary consequences are not jeopardised, except by a fair procedure. The extent of the application of course depends upon the frame work of the Statute. Bearing in mind the scheme of the SEBI Act and the Regulations, as discussed, a complete embargo under proviso to sub-rule (5) of Regulation 28 on the enquiry officer or the appropriate authority even to consider a request of the

delinquent stock broker to permit him to be defended through lawyer, in my view, is bound to lead to considerable hardships affecting the civil rights of a person arbitrarily and unreasonably which deserves to be struck down being violative of Article 19 and 21 of the Constitution of India.

19. The contention of the learned counsel for the SEBI that no request was made by the petitioner that he may be permitted to appear through lawyer, has no force as in view of the proviso to sub-rule (5) of Regulation 28, such a prayer could not be made. As the petitioner was deprived during the enquiry to make request to be defended through a lawyer and so the enquiry being in violation of principle of natural justice, the entire enquiry proceedings against the petitioner deserves to be quashed and set aside and so as, all the proceedings subsequent thereto.

20. In view of the aforesaid discussion, this Special Civil Application is allowed and the proviso to Regulation 28(5) of the SEBI Regulations, 1992 is declared ultra vires of the Constitution of India and accordingly, it is struck down. further, as a consequence, the order of the respondent No.1 dated 29/08/1995 and that of the respondent No.2 dated 24/04/1995 are quashed and set aside. It will be open for respondent No.2 to hold a fresh enquiry against the petitioner in accordance with the law. Rule made absolute. Cost easy.

parmar*

21. Mr Raval, learned counsel for the respondents SEBI prays for the stay of the operation of the order for a period of four weeks. Considering the facts of the case and the important question of law involved in the matter, the operation of the judgement of this Court so far as it relates to the declaration of proviso to Regulation 28 (5) of the SEBI Regulations, 1992 is concerned, is stayed for a period of four weeks.

FEBRUARY 27, 1997 [N.N.MATHUR, J.]

parmar*